Supreme Court, U.S.
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No. 93-794

In The

# Supreme Court of the United States

October Term, 1993

DAVID GILLUM,

*Petitioner,*

v.

THE CITY OF KERRVILLE, TEXAS, GLENN D. BROWN, IN HIS OFFICIAL CAPACITY AS CITY MANAGER AND HIS INDIVIDUAL CAPACITY, LOUIS A. BARROW, JR., IN HIS OFFICIAL CAPACITY AS POLICE CHIEF, AND IN HIS INDIVIDUAL CAPACITY, KIRK MCCARLEY, IN HIS OFFICIAL CAPACITY AS PERSONNEL DIRECTOR AND IN HIS INDIVIDUAL CAPACITY,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Supreme Court should overrule *Connick v. Myers* and *Rankin* to give way to Petitioner's own analytical framework in cases involving freedom of speech within the context of governmental employment.

2. Whether the Court of Appeals followed the decisions in *Connick* and *Rankin* in deciding that the Petitioner was not speaking on a matter of public concern.

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## RESPONDENTS' BRIEF IN OPPOSITION

## OPINIONS BELOW

The opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is dated September 16, 1993, is reported at 3 F.3d 117 and is reprinted in the Petitioner's Appendix, pp. 1-24. The case number is 93-8006. The prior Order and Judgment of the United States District Court for the Western District of Texas, San Antonio Division, were entered on November 30, 1992.

The case number is SA-91-CA-0090. The Order and Judgment of the District Court are reprinted in the Appendix to Petitioner's Writ, pp. 26-74.

## JURISDICTION

Respondents agree that this court has jurisdiction for discretionary review under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The First Amendment of the United States Constitution is set forth in the Petition and need not be repeated here.

## STATEMENT OF THE CASE

Respondents agree with the Factual Background set forth in the Court of Appeals' opinion. The following details are offered to assist the court in evaluating these issues in context, as required under the tests set forth in *Connick v. Myers* and *Rankin v. McPherson*. Each of the relevant conversations were secretly taped by Mr. Gillum, and portions noted herein are contained in the appendix to the Petition or to this Response.

The City of Kerrville, Texas is located in south central Texas, and has a population of about 17,384. It has a Council/Manager form of government, and departments that administer City affairs. The City Manager was Glenn Brown. The personnel department was headed by Kirk

McCarley. [R 280] Louis A. Barrow was the police chief in January 1990.

Chief Barrow had made changes in the Department after arriving, and all of the officers did not readily accept his more formal approach for their department. One of his actions was to adopt a written policy for internal affairs investigations in the Department. It is undisputed that Policy 90-06 was in effect, and it appears in the appendix. That policy provides at pages 927, and 934 for the assigned internal affairs investigator to handle all investigations. The policy requires officers to refer all matters falling under the policy to that person, and further requires written statement to be taken in connection with investigations. [R at 930, 931] It further states: "NO PERSON, OTHER THAN THE ASSIGNED INTERNAL AFFAIRS INVESTIGATOR, WILL INVESTIGATE PERSONNEL COMPLAINTS. THIS INCLUDES CONTACTING WITNESSES, COMPLAINANTS, AND OTHERS INVOLVED. IF INFORMATION REGARDING A COMPLAINT COMES TO AN EMPLOYEE'S ATTENTION, HE SHALL FORWARD IT TO INTERNAL AFFAIRS. REQUEST FOR ADDITIONAL INVESTIGATION SHALL BE MADE IN WRITING THROUGH INTERNAL AFFAIRS." The policy provides for any member of the department being investigated to be informed of the charges, and to have an opportunity to respond. [R at 930, 934, 942] Defendants have admitted that it does not have a provision for investigations of the Chief, and that fact is noted by the District Court. However, the procedure does state that it applies to police or member misconduct, provides that any criminal matters investigated by Internal Affairs are to be referred to the Criminal Investigative

Division for the preparation and filing of any criminal charges and requires the Internal Affairs Investigator to "MAINTAIN LIAISON WITH THE DISTRICT ATTORNEY'S OFFICE IN THOSE INSTANCES WHERE AN OFFICER OR EMPLOYEE HAS BEEN CHARGED WITH, OR IS INVESTIGATED FOR ALLEGED CRIMINAL CONDUCT." [R at 946]

David Gillum was a patrolman in the police department. He had been working for the City since 1987. He had previously been the subject of friction and disagreement with Chief Barrow. [R 01085] He had never been disciplined by the Department. [R 282]

About August 1, 1990 David Gillum went to Rosie McCray and told her that he had heard about someone claiming that they had partied and smoked dope with the Chief. Gillum then went to Sergeant Joe Lanning, the assigned head of the Internal Affairs division, for guidance on how to handle the information he had received. [R 688-702] He does not claim to have told Lanning about any apprehension or concern about Lanning's involvement. According to Gillum, Lanning expressed doubt about the truth of the information. Nevertheless, it is undisputed that he permitted Gillum to go and interview the person that had reportedly uttered the statements. [R 993]

As noted by Chief Barrow in his Respondent's brief, Gillum later explained himself to McCarley and made it clear that he was not making an allegation or complaint. However, as shown by the context of the recorded conversations, David Gillum reacted to being taken off of the investigation before he was ready to take a position, and

refused to follow the written internal policy if Lanning was to handle the process.

Gillum interviewed Cheryl Schilling and she denied that any such thing occurred. Gillum came back to Lanning on August 1, 1990 late in the afternoon and reported the conversation. He says that he told Lanning that he had taped the interview, but he did not provide the tape. Lanning gave him permission to go and interview another witness that had been identified by Schilling. [R 01047] Gillum had expressed no reservations about dealing with Lanning at this point.

Chief Barrow, who has heard of the allegations, meets with Lanning. Lanning says that he told the Chief what he was doing. [R 00310] Gillum, of course, sees conspiracy in this contact, whatever may have been said. Lanning had contacted his superior, Chuck Dickerson, and the Personnel Director, Kirk McCarley, about the allegations and his intention to let Gillum look into it, to make sure that he was acting appropriately, and that people higher up were aware of the situation. [R 996]

Lanning calls Gillum back to the office. This time, Gillum tapes the conversation with Lanning. The transcript is in the record [R 00686]. Lanning states that he has talked to the other witness (Debbie) already. He tells Gillum that "I would like you to be assured yourself, you know that everything is on the up and up, and on the same hand I looked over the directives again. All internal investigations have to be handled through this office." He tells him " . . . I want to make sure that we are not dealing out of the guidelines by you being involved in an internal investigation and get yourself on a hook because I told

you to go ahead and keep doing it. I can't do that." [R 687; Pet. App. 76-78] Gillum acknowledges that Joe is talking about having everything written up and signed, and Lanning tells him the reason for that is the seriousness of the allegations about the executive of the Department. Lanning further says that he does not want Gillum to think he is just trying to get him "off of this thing." Gillum says that is precisely what he is thinking. [R 688] Questioning the application of the guidelines without a written complaint, Gillum suggests that he only came to him as a friend, about whether or not he was doing it right. Lanning explains that "We are not doing it right by procedures . . . You're talking about members of this department . . . And the only people to investigate members of this department is this division." [R 688; Pet. App. 80-81]

Then Mr. Gillum begins to talk about his own personal problems and attitudes about the way the department is run and the complaints in the ranks about the administration. This discussion includes promotion and testing, treatment of former officers coming off of drug task force duty, the amount of paperwork, and the changes in the department's expectations about documenting police work. [R 691-693] Gillum does not state any reason that he opposes the procedure or Lanning's investigation. Lanning tells David that the Chief's supervisor is aware of the issue. [R 693; Pet. App. 91] Lanning tells Gillum that he intends to do a full documented investigation since he perceives that a "cover up" claim will be the next rumor. [R 694] Lanning directs Gillum to give him a written statement about the matter, and Gillum refuses. [R 695; Pet. App. 95] Lanning calls in Gillum's supervisor, who also orders him to give a statement and he refuses. [R 696-699]

Gillum has admitted that the policy was being correctly applied by Lanning [R 00393]; that a proper investigation would require a written statement from Gillum [R 00395]; that Joe Lanning was in error for authorizing his initial involvement, [R 00395]; that he wasn't surprised when Joe reversed his decision. [R 01094] He also admits that Lanning said it would be investigated. [R 00867]

After twice refusing to follow the policy and give a written statement, Gillum was called into a meeting with McCray, Lanning, McCarley and Barrow. The meeting was also secretly taped by Gillum. The transcript is a part of the record [R 00700; Pet. App. 102-140].

The Chief tells him that he knows what the allegations are. He immediately points out that the reason that the Personnel Director is present "to see to it . . . that the investigation is handled properly." [R 00702] He stated that "If its not innuendo then we'll prove its not innuendo . . . ok? and continued that "If I'm guilty of misconduct, Mr. McCarley is here to see to it that something takes place." [R 00700-00702]

Gillum states again that "I went to Joe for advise, not a complaint." [R 00702; Pet. App. 107] He does not discuss the allegations, but only refers to them. He agrees that prior rumors about the Chief have proven erroneous. Then he begins to talk about morale problems and mistrust, and how the Chief is pushing the Beaumont way in Kerrville. Nevertheless, he agrees that morale was real bad even before Barrow was hired as Chief. [R 00702-00705]

Gillum explains that he was checking the allegation out and "I was told not to . . . period! That somebody else would check it out." [R 00707] McCarley responds by

telling him "That . . . that's procedure. That's protocol . . . You, you gotta have procedures, I mean . . . And this is the . . . man that you need to go to when you have a complaint. And that's how . . . how a complaint is lodged. And its up to him to investigate." [R 00707; Pet. App. 118-119] Gillum admits that following the correct investigation procedure was one of McCarley's stated options. [R 00868]

Gillum responds that he "didn't have all his stuff together to take it to Joe to even complain. But, now I'm told I can't do nothing about it." Chief Barrow replies "That's not true! You can give your information to Lt. McCray and to Sgt. Lanning and let them do the investigation. That's what you are being told you can do. You want me to leave, I'll leave, David. 'Cause I want this shit stopped! Now either you cooperate with these people, or you don't." [R 00708]

Gillum questions whether Joe Lanning is biased, and they argue about how Joe was selected and whether he can be trusted to find out the truth. His direct Supervisor, Lieutenant Rosie McCray reminds him that it is Joe's job, and he "knows when he gets a complaint, he has to handle it . . . And regardless of who he's investigating, he has to be fair, or else he's in trouble. If it comes out down the line that he covered up something, well then he's in it, too! I feel Joe would be fair about anything, even the Chief . . . Anything he come up with, and you're not satisfied with, you can appeal it. There's always someone higher you can go to." [R 00708-00709; Pet. App. 123-24]

Gillum then recites that he has interviewed the girl, and that "she denied everything, other than the party

itself . . . or gathering. But no dope was involved. She mentioned another person, I was gonna go talk to her. If, in fact, she denied the same thing, then what else am I gonna go, where else am I gonna go? I'm gonna have to come to you and say Joe, I found this and this and that and it's . . . that's it, I can't . . . there's nothing there." [R 00709]

Joe Lanning replies that "The problem here, David, though, is that you are not the one person to investigate internal problems. That is for my division, and you were told that, under those circumstances, and you have been told to cooperate with this investigation to it's fullest, which you have refused to do." Gillum agrees and says "That's how I stand, right there." and again refuses to cooperate with any questions that Lanning might ask with regards to his investigation. [R 00709-00710; Pet. App. 126]

Gillum then reveals that "there's nothing that can happen right now that would satisfy me . . . my mind . . . and I realize that's it's just mine, uh, that would make me say, yeah, Alwin Barrows does not smoke grass. There's nothing that could happen now." [R 00710; Pet. App. 128]

The discussion continues about whether there is any way that a patrolman can work in a department with no trust in the Chief. Kirk McCarley reminds Gillum again that "this is just a procedure . . . You have a procedure, whereby if you have a problem, to go through, you just tell your commanding off . . . your lieutenant, who then refers your internal affairs person to investigate." [R 00711] Lanning explains what he needs to continue. [R 00712]

Kirk McCarley says that it sounds like Gillum wants to continue the investigation on his own. He says that Gillum can let it drop or let the charge be brought to internal affairs, "which is your procedure, free and clear. And that's all there is, you have two choices here. We're not gonna force you out." [R 00712-00713]

After the Chief leaves the room, Gillum says that he is not going to compromise his badge, takes it off and lays it and his gun on the table and leaves. He goes down the hall and tells the dispatcher, Larry Rhodes, that he did not quit. He did not clean out his locker or submit a formal resignation. [R 00714]

David Gillum reported back for work on his next scheduled day. He inquired about his job status. [R 00715-00719] He states that he was told by McCray that she did not know. He is told that he quit. [R 00715] He meets with McCarley who asks him again why he would not cooperate with Lanning under department policy, and Gillum refers to "my investigation", saying "When I had the whatever evidence or lack of evidence, considering Joe knew about it, I would have given it to him." He further states that "Because I am going to find out before I file a complaint . . . I'm going to investigate first." [R 00716-00717]

Gillum requested and received before the Barrow and McCarley. The transcript of the hearing is in the record at [R 00720]. After this hearing, Gillum appealed to the City manager. A closed hearing was held before Glenn Brown on October 4, 1990, although Gillum's counsel requested that the hearing be open under the Open Meetings Act. [R 00992] Glenn Brown hears the matter and makes a

decision by letter dated October 22, 1990 [R 00923]. He addresses the controversy, expresses his reasoning and decides that Gillum sincerely "did not feel he had resigned". He offers him reinstatement to his position, but does not indicate that he is to be awarded back pay. His letter comments on developing a good working relationship for the future. [R 00923-00925]

Gillum did not accept his job back. He filed suit on January 25, 1991. The City offered a name clearing hearing on March 15, 1991, but Gillum did not attend.

On February 24, 1992, the Plaintiff/Petitioner was convicted of the felony offense of aggravated assault of a peace officer with a deadly weapon. As a result of this conviction, Plaintiff can no longer be employed as a police officer.

## REASONS FOR DENYING THE WRIT

### A. Summary of the Argument

#### 1. Continued Viability of the *Pickering* and *Connick* Tests

At issue in this case is the context of Gillum's statements. Whether or not a public concern exists must be determined as a matter of law from all of the facts and circumstances. Defendants do not believe a First Amendment claim arises when an employee accompanies insubordinate refusal to follow an ordinary written procedure with an explanation of why he does not agree with the process or his decision that the assigned investigator is not acceptable to him.

Under the standards of *Connick v. Myers* and *Rankin v. McPherson* the Court of Appeals properly evaluated the context of Gillum's statements and found that his own interests as an employee were at issue. No modification of the principles in this Court's cases is necessary in order to protect the right of free speech in the government work place. The current standard allows any employee to speak as a citizen, while recognizing that a police department cannot be "a roundtable for office complaints over internal affairs." The police officer's obligations under an Internal Affairs procedure cannot be evaluated in the same context as a town meeting.

### 2. A Correct Legal Result on These Facts

Where a public employee is required to make a true statement under oath of his information and involvement, informed that all witnesses will be interviewed and written statements obtained, assured that he will be given an opportunity to see the statements, told of his right to appeal in the event of disagreement, and assured that the superiors of the Chief will be monitoring the process, no public concern is implicated by this officer's insistence on the right to be the investigator, or to veto the process established by the department.

This case involves Gillum's own role in the process. The issue of his opinions arose only in the context of his disappointed intentions. He was making no allegations or complaints himself. He was not seeking to have others investigate wrongdoing, as is the case in many First Amendment disputes, but to do it himself. By his own statements, he was prepared to follow the rules only after

he had met his own investigative standard. [Pet. App. 150] In the controversy fomented by David Gillum's acts/explanations, the Chief was not the issue, the issue was what David Gillum was required to do. Under the correct standards, the Court of Appeals correctly concluded that no public concern was involved, as a matter of law.

### B. Continued Viability of the *Pickering* and *Connick* Tests

This court's opinion in *Rankin v. McPherson*, 107 U.S. 2891 (1987) says, "The determination whether a public employer has properly discharged an employee for engaging in speech requires 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Id.* at p. 2896 (citing *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 568 (1968)).

This principle is just as sound, and just as necessary today.

The roundtable discussion from Kerrville, Texas, excerpted above in the statement of this case, calls to mind the language from *Connick v. Myers*, 461 U.S. 138 (1983), "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark-and certainly every criticism directed at a public official-would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment

does not require a public office to be run as a roundtable for employees' complaints over internal office affairs."

*Connick* was this court's dividing line between the role of a worker, subject to supervision – and the role of a citizen, in his own government. It is necessary to enable *operation* of the government workplace and preserve the citizen/employee's right to speak. The court recognized that public employees were not entitled to demand consensus on running the office. It required that, "Whether an employee's speech addresses a matter of public concern must be determined by content, form, and context, of a given statement, as revealed by the whole record." *Id.* at 1690.

Having performed this analysis, the Court observed that, "While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors. These questions represent one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre."

The Court of Appeals reviewed these same types of considerations in the context of Gillum's employment dispute, in a manner that is just right. It recognized the key importance of his own displeasure at being supplanted, and his purposes in acting and reacting as he did. It recognized that issues of concern to the public in a different context, or in a different forum, were not public issues in the context of Gillum's dispute over *his* role.

The Fifth Circuit applied these same principles in *Terrell v. University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986), cert. denied, 479 U.S. 1064 (1987) an

opinion directly founded upon *Connick*. Building upon this foundation, in a manner distinctly reminiscent of Ms. Myers, the Court of Appeals held that no public concern was involved here, "To be sure, corruption in an internal affairs department is a matter of public concern. Gillum's focus was, however, on this issue only insofar as it impacted his wish to continue his investigation." Pet. App. 11.

This case fits the "roundtable" analogy. The meeting that transpired would never happen in many departments. Kerrville officials engaged in a roundtable with David Gillum over his own role in the process, but he emerged unmoved. Four days later he still insisted on the right to satisfy his own investigative standard before taking a matter to Internal Affairs. [Pet. App. 146-147, 150] *Rankin v. McPherson* recognized that, "On the one hand, public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions." *Id.* at 386.

The logic of a test that does not grant a jury trial in every dispute over an employee's own job is no less compelling than the day that *Connick* was written. In this case the logic is compelling, since the statements arose only in the context of Gillum's own duty, role, and orders.

The rationale of this court's cases properly allows consideration of the differences in particular public environments, in deciding when a public concern is involved.

Petitioner would have the court ignore or abandon the contextual "as a citizen" language quoted from *Pickering* in evaluating this case. That language correctly recognizes the dual role of employer/employee and government/citizen. It must be a factor in determining the public concerns involved and balancing the interests involved, or "roundtable" management would be inevitable.

The cases noted by Petitioner do not demonstrate conflict or unpredictability. They demonstrate the infinite fact situations in which the test must be applied, and the need for a standard which recognizes the "citizen" distinction. Most importantly, none of the cases are a good fit or apt comparison.

In *Brockell v. Norton*, 732 F.2d 664 (8th Cir. 1984) the police officer followed the proper policy in the chain of command initially, and spoke outside of channels after nothing happened. In considering Gillum's case, the Court of Appeals noted, "Had he submitted his statement and later found it was ignored, he might have complained or 'gone public.' Firing Gillum for those acts would have presented a quite different case." [Pet. App. 12]

*Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988) held that a topic, otherwise of public concern, did not lose its importance just because it related to disagreements with superiors. However, Hall's alleged statements were public statements, implicating his role as a citizen, and not just an employee.

*Buzek v. County of Sanders*, 972 F.2d 992 (8th Cir. 1992) involved a police officer that wrote a letter to a Judge in connection with sentencing. Buzek was not refusing to

perform a duty, and his speech was outside of the organization.

In *Conaway v. Smith*, 853 F.2d 789 (10th Cir. 1988) the electrical inspector made public comments, responded to the news media, filed internal reports, and reported to the City Administrator his *own knowledge and complaints* about his supervisors.

*Wulf v. Wichita*, 883 F.2d 842 (10th Cir. 1989) involves a several year period of continuing disputes. Communications among members of the Fraternal Order of Police, a letter to the Attorney General, and information in the press were the expressive conduct. It overlaps this case only to the extent that there was an "official investigation", and a refusal to respond until counsel was consulted. It clearly involved issues beyond Wulf's personal relationship as an employee.

*Solomon v. Royal Oak Township*, 842 F.2d 862 (6th Cir. 1988) did not involve any controversy over Solomon's duty or performance, and arose from statements to the press.

*Marshall v. Allen*, 984 F.2d 787 (7th Cir. 1993) involved support of *other* Plaintiffs in litigation against a housing agency. That opinion reads the *Connick* test to require an evaluation of the *point* of the speech in question. It recognizes that the employee may bring up issues of public concern in a context of private interest or advantage, posing the inquiry: " . . . was it the employee's point to bring wrongdoing to light? Or was the point to further some purely private interest?"

*Maciariello v. Sumner*, 973 F.2d 295 (4th Cir. 1992) involves the personal interest and animosity of two officers motivating their own investigation. Applying the *Connick* test, it notes that this motivation detracts from the professed interest in exposing official corruption. It recognizes that a topic may be of public concern, but the issue, in context, may have only private and personal character.

This court has recognized that police departments have legitimate interests in discipline beyond that of the ordinary government office. *Kelley v. Johnson*, 425 U.S. 238.[1] It has also recognized that, in a sense, every aspect of operating a government office is of "public concern."[2] These issues underscore the need for the dual role analysis of *Connick*. Petitioner states that the employee will always be wearing that "hat," but misses the point that every statement by a police officer on the subject of his employment cannot be of public concern. Every time a police officer has a dispute about policy or procedure a public concern does not arise. Where the employee speaks only when his own involvement is at issue, and only within the environment of his supervision as an employee, he has not stepped out of the zone of purely private concerns.

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[1] *Maciariello*, supra, states that "Policemen are at the restricted end of the spectrum because they are 'paramilitary' – discipline is demanded, and freedom must be correspondingly denied." Citing *Hughes v. Whitmer*, 714 F. 2d. 1407, 1418 (8th Circuit 1983), cert. denied. 465 U.S. 1023, 104 S. Ct. 1275, 79 L.Ed.2d 708 (1976).

[2] *Connick*, at 1691.

The court's current test is the correct one. The "clear impairment" test urged by Petitioner, at least as applied to police departments, would constitutionalize every workplace dispute over policy and assigned employees.

### C. A Correct Legal Result on These Facts

The review of the record for both the public concern and balancing of interests is a matter of law. *Rankin*, at 386. Petitioner's citations to a fact based standard for summary judgments do not apply to the Court's rulings on these issues. The Court is to look to the entire record on the question of law, and the Court of Appeals clearly did so.

The Court of Appeals correctly evaluated the context of Gillum's statements. It considered the "personal" issues involved, the time when Gillum's statements were made, the wholly supervisory context, and the assurances that he retained his rights to "dissent". These issues were properly considered, and should be determinative. These factors show this to be a dispute about whether Gillum was to follow the rules like everybody else, or had a veto power under the First Amendment.

This case is not about a Police Chief's criminal misconduct, so clearly a matter of public concern that it was admitted by the Defendants in their original Response. Gillum expressed no opinions about the Chief's misconduct, he just took the information he had to Lanning and asked for advice. [R 00702] Gillum did not engage in any

"expression" until told that he was not going to continue the investigation.[3]

The Court of Appeals correctly analyzed this case not as a "complaint" that Gillum made, but a refusal to cooperate with someone else's investigation of the subject matter. Mr. Gillum did not follow the internal procedure for a complaint, and he did not exercise his right to speak in a different forum, he just "clammed up" and refused to move.

As such, Gillum's status here was not over-emphasized by the Court of Appeals. No confusion resulted from the distinction between his interests as an employee versus his interests and rights as a citizen.

At no time was David Gillum criticized for bringing the facts of the complaint to the attention of Lt. Rosie McCray or Lt. Joe Lanning. At no time were any restrictions placed upon his right or authority to speak publicly. At no time did he speak or attempt to speak in any forum concerning the conduct of the Chief, or the viability of the investigation. He merely refused to answer questions or to cooperate further in the internal process, once he decided that he was suspicious of Lanning's actions. He did this in spite of the explanations and assurances made to him that a full investigation would be conducted, and that he could have access to the material, and appeal it if he disagreed. [R at 00709] The Chief offered to leave the

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[3] Defendants believe that an employee that processes or handles information is not thereby "speaking" about it in a First Amendment sense. Gillum has insisted all along that he was not making a complaint against the Chief, and was not factually prepared to do so.

meeting before Gillum said anything about his presence. [R at 00708, 00711] For an innocent man to say he intended to clear his name is no more than Gillum expected. [R 00836] It is a great irony that this Plaintiff claims First Amendment rights, when he was being asked to make a full written statement concerning the matter, and continually refused.

*Terrell v. University of Texas System Police* correctly applies *Connick*, and is firmly founded on its principles. As shown by the footnotes, it finds its support in the *Connick* conclusion that personal employee concerns may be *either* public or private issues in the first amendment sense.[4] It properly relies upon *Connick* in giving weight to the absence of public reporting, and the fact that Gillum was not making an allegation of wrongdoing.[5]

*Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1978), did not involve a dispute about the employee's role in carrying out a policy. It was characterized by this court in *Connick* as a case "where an employee speaks out as a citizen on a matter of general concern, not tied to a personal employment dispute, but

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[4] "We view the questions pertaining to the confidence and trust that Myer's co-workers possess in various office supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myer's dispute over her transfer to another section . . . " *Connick*, at 1690.

[5] "Myers did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing . . . on the part of Connick and others." *Connick*, at 1691.

arranges to do so privately." *Connick* at 1691, n.8. It stands only for the proposition that the private nature of the communication does not end the inquiry. That opinion further supports the Court of Appeals' evaluation under the citizen/employee distinction. It further notes that, "Private expression, however, may in some situations bring additional factors to the Pickering calculus."

In our case, the conflict is solely over Gillum's investigation. It involves the very relationship between a police officer and his department. Upon it depends the ability of the department to require documented, full and complete investigations, with the cooperation of all that have information.

## CONCLUSION

The Petition should be denied. The court's current test is the correct one. It protects the rights of the citizen/employee, but allows efficient operation of government offices. The "clear impairment" test urged by Petitioner, at least as applied to police departments, would constitutionalize every workplace dispute over policy and assigned employees.

The Court of Appeals correctly applied the principles set forth in the opinions of this court. Just like the concerns of Ms. Myers, Gillum's focus was on his role and his assignment. Allowing Gillum to veto the assigned investigator in the context of this entire record would

certainly create a roundtable for employee complaints over internal office affairs.

Respectfully submitted,

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